Office of the Assistant Attorney General

Washington, D.C. 20530

May 30, 1985

Honorable David A. Stockman
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Stockman:

This is in response to your recent request for the views of the Department of Justice concerning H.R. 271, a bill to amend the National Security Act of 1947 to establish by law procedures for the classification and protection of sensitive information relating to the national security, to provide criminal penalties for the unauthorized disclosure of such information, to limit matters that may be classified and impose penalties for unauthorized classification, and to provide for declassification. The Department of Justice is opposed to the enactment of this bill. While we generally favor legislation prohibiting the unauthorized disclosure of classified information, we think it both inappropriate and unnecessary for Congress to prescribe procedures for the classification and protection of national security information.

First, it is our opinion that H.R. 271 would entail several policy and practical problems which, standing alone, constitute a strong basis for opposing the enactment of this bill.*/ The Executive Branch, as a matter of policy, is far

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*/ It has also been the consistent position of the Department of Justice that the protection of national security information is a primary and fundamental constitutional responsibility of the President that derives from his responsibilities as Chief Executive, Commander-in-Chief, and the principal instrument of United States policy. Although the constitutional powers of the coordinate branches of the Federal Government are often shared even where one branch has primary authority, we are concerned that H.R. 271 would have the effect of limiting the President's constitutional authority to protect sensitive information relating to the foreign relations and national security of the United States as he has deemed necessary in Executive Order 12356. If H.R. 271 were to have such an effect, it might raise sensitive and difficult separation of powers questions.

better equipped than Congress to establish and administer a set of criteria for the classification and declassification of national security information. The Executive possesses the most timely and complete information necessary to determine whether information should be classified to protect the Nation from physical harm or damage to its foreign relations. Moreover, the practical effect of H.R. 271 would be to introduce an element of statutory rigidity into an area that requires flexibility and adaptability in order to respond to the changing circumstances and manifold contingencies of foreign affairs. This process of change and refinement in the criteria for classification is reflected in the issuance of several Executive Orders in recent years governing the classification of national security information, culminating in the issuance of Executive Order 12356 in April 1982.

In particular, Section 502(b)(3) of the bill would weaken the substantive criteria that the Executive Branch has determined should govern classification determinations, by requiring that information could not be classified unless its unauthorized disclosure would cause at least "identifiable damage," whereas currently, information that could reasonably be expected to cause any damage to the national security is classified pursuant to E.O. 12356, Section 1.1(a)(3) and 1.3(b). Further, Section 504(d) would encourage challenges to classification determinations by requiring that any "reasonable doubt" as to the level or propriety of classification should be resolved by applying the least restrictive applicable alternative.

Further, section 509, which would criminalize unauthorized disclosures of classified information, would subject persons who, without authorization, disclose classified information to a foreign government or foreign agent, to life imprisonment or imprisonment for any number of years, and would subject persons who disclose classified information to any unauthorized persons to fines not to exceed $5,000 and/or imprisonment for not more than one year, or, if the offender had authorized possession of the classified information, to imprisonment for not more than ten years, and/or a fine not to exceed $10,000.

The decision to endorse a criminal statute concerning the unauthorized disclosure of classified information should be made by high level administration officials, after careful study of the matter, in accord with the agreement reached at an inter-agency meeting chaired by the General Counsel of the Office of Management and Budget, on March 27, 1985. Before endorsing a proposal such as Section 509, the Department would need to determine: (1) the effect of the proposal on existing espionage statutes and related laws, in order to avoid unintended consequences and troublesome inconsistencies; (2) whether the proposed statute would survive constitutional challenges predicated on the First Amendment, and other legal challenges, and (3) whether the provision is redundant or, if not, whether it adequately fills gaps in existing laws that preclude us from prosecuting individuals who willfully disclose national security information without authorization. These issues could be properly assessed only after careful review.

In addition, we question the advisability of including the defenses to prosecution in subsection (d), specifically the defense that the information was not lawfully classified. Presently, in prosecutions under similar statutes (i.e., 50 U.S.C. §783 and 18 U.S.C. §798), the government does not have to prove the legality of the classification. In fact, courts have held that such an inquiry is irrelevant. See, United States v. Boyce, 594 F.2d 1246 (9th Cir. 1979) (prosecution under §798); Scarbeck v. United States, 317 F.2d 546 (D.C. Cir. 1963) (prosecution under §783). This is reasonable because classification itself places the holder of the information on notice of the necessity for pursuing authorized channels for disclosure and because of the problem of revealing additional classified information in the course of proving the validity of the classification of the information that has been disclosed.

Subsection (e) of Section 509 makes the determination of whether the information is lawfully classified a matter of law to be determined by the court. This provision could constitute

a basis for challenges based on alleged violations of due process and the Sixth Amendment right to trial by jury. Whether this provision would be upheld by the courts is uncertain in light of case law holding that all factual issues relevant to guilt or innocence are to be decided by the jury rather than by the court. See, e.g., United States v. Walker, 677 F.2d 1014 (4th Cir. 1982); United States v. Austin, 462 F.2d 724 (10th Cir. 1972); Belton v. United States. 382 F.2d 150 (D.C. Cir. 1967). Further issues exist with respect to Section 509 concerning the lack of a "willfulness" element, the effect of the proposed statute on existing provisions of the law, and whether the coverage of the statute is meant to include recipients of classified information as accomplices, conspirators, or solicitors. Moreover, courts are ill-equipped, and often disinclined to make determinations as to whether, and to what extent, an unauthorized disclosure would damage the national security. See United States v. Hung, 629 F.2d 908, 913-914 (4th Cir. 1980), and cases cited therein.

Subsection (f) of this Section would authorize the Attorney General to seek an injunction against the unlawful disclosure of classified information and would authorize the courts to grant such injunctions upon a showing that a person sought to be enjoined is about to engage in such conduct and that the information was lawfully classified. We believe subsection (f) would be interpreted narrowly to create a statutory right of action in the Attorney General to seek an injunction on behalf of the United States against unlawful disclosures, and not to alter in any way the substantive result reached by the Supreme Court in New York Times Co. v. United States, 403 U.S. 713, 714 (1971). In that case, several Justices commented on the lack of an express statutory prohibition against the publication of information in the circumstances presented. Subsection (f), however, does not purport to provide "limited congressional authorization for prior restraints [tailored to specific] circumstances . . .," such as was suggested by Justice White in his concurring opinion in New York Times Co. See 403 U.S. at 732 (White, J., concurring, joined by Stewart, J.) Therefore, we believe that the only effect of subsection (f) would be to provide to the Executive Branch, by statute, a procedural right of action to seek injunctive relief. We do not believe that such statutory authority is necessary, or that the lack of such express

authority would preclude the Government's seeking an injunction on a particular set of facts, if the substantive burden required by New York Times Co. v. United States could be met. Thus, while the authority provided by subsection (f) might be useful procedurally in that it would eliminate any possible doubts about the Attorney General's authority to seek such injunctive relief, it would not serve to lessen the heavy burden imposed upon the Government in justifying the imposition of such a prior restraint and the actual benefit to the Government may be minimal.

Finally, with respect to the bill's Section 510, we are of the opinion that the present system of administrative sanctions is sufficient to deter improper classification and feel that the fear of criminal sanctions would cause those who make classification decisions to act with excessive caution.

At a minimum, Section 510 should be modified to provide that it is a defense to prosecution that the information in question was properly classifiable or that the classifier believed in good faith that the information was properly classifiable. As presently written, this section can be read to expose the classifier to criminal liability if concealment were one of his motives, even if he believed in good faith that disclosure would harm the national security. If there is to be any criminal liability for improper classification, it should not turn upon the presence of a purpose to conceal, but upon the absence of a good faith belief that disclosure would damage the national security.

Classifying information the disclosure of which would clearly be harmful to the national security could have the secondary effect of concealing incompetence, inefficiency, wrongdoing or administrative errors, or of avoiding embarrassment to individuals or agencies. For example, information concerning an unsuccessful missile test firing may clearly warrant classification, because the disclosure of that information would cause grave damage to the national security, yet the effect of classifying that information might well be to

conceal incompetence, inefficiency, wrongdoing or errors by those who carried out the test firing. Indeed, such a concealment may be one of the proper purposes of classifying the information in question; the information that must be concealed from our adversaries may not be that the test firing occurred or the purpose of the test firing, but the error which caused it to fail. Concealment is not wrongful, however, unless it is done for its own sake rather than to protect the national security against damage.

For all of these reasons, but most particularly because of the policy and practical problems associated with this bill, we think it both inappropriate and unnecessary for Congress to enact H.R. 271.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General
Office of Legislative and Intergovernmental Affairs

By

Michael W. Dolan
Deputy Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs